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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1105

JOSEPH CLINTON McBRIDE,

Petitioner,

—v.—

WILLARD SMITH, Commandant, United States Coast Guard,

Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

MELVIN L. WULF
156 Fifth Avenue
New York, N. Y.

BENJAMIN S. DuVAL, JR.
25 Broadway
New York, N. Y.

MARVIN M. KARPATKIN
660 Madison Avenue
New York, N. Y.

Attorneys for Petitioner

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Joseph Clinton McBride prays that this Court grant rehearing of its order of May 29, 1967, denying the petition for a writ of certiorari, 35 U. S. L. Week 3419, and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Circuit in the above-entitled case as prayed for in the petition filed March 1, 1967, herein.

Reasons for Granting Rehearing and Issuing the Writ

1. On May 26, 1967, the Friday immediately preceding the Monday on which the writ of certiorari was denied in this case, an appeal was docketed in *Schneider* v. *Smith*, No. 1427. That appeal was from a judgment of a statutory three-judge district court for the Western District of

Washington, dismissing a complaint which sought a declaration of unconstitutionality of the same statute and regulations drawn into issue in the case at bar.

Appellant in *Schneider*, like petitioner in the instant case, is a qualified and licensed merchant mariner. In October, 1964 he applied to the United States Coast Guard office in Seattle for renewal and validation of his merchant mariner's document. The Coast Guard refused to process his application or to validate his merchant mariner's document, which is required as a condition of his employment as a merchant seaman, unless he answered under oath questions about his present and past political activities and beliefs. Specifically, appellant was initially requested as part of his application to answer under oath the question: "Are you now, or have you ever been, a member, or affiliated, or associated with in any way . . ." any of the approximately 300 organizations named by the Attorney General as "subversive". He answered "Yes", and added an explanation: "I have been a member of many political and social organizations, including several named on this list. I cannot remember the names of most of them and could not be specific about any. To the best of my knowledge I have not been a member or participated in the activities of any of these organizations for ten years."

The Coast Guard took no action of any kind on appellant's application until an inquiry was made on his behalf by his attorney. A reply from the Coast Guard excused the delay on the grounds of appellant's "reluctance to furnish names and dates of his membership in several of the organizations which have been designated by the Attorney General . . .", but "anticipated that action will be taken

in the near future." Subsequently, the Coast Guard sent a set of interrogatories to the appellant to be answered under oath. These interrogatories asked a number of questions relating to appellant's membership in political and social organizations, the nature of his activities in those organizations, his reason for discontinuing membership, and his present attitude towards the principles and objectives of the organizations. Appellant refused to answer these interrogatories and was advised by the Coast Guard that no further action would be taken on his application until and unless the interrogatories were answered. He thereupon filed his complaint.

The authority upon which appellee relied in *Schneider* was identical to the authority relied upon in the case at bar to deny petitioner, in this case after hearing, a validated merchant mariner's document: namely, the Magnuson Act, 64 Stat. 427 (1950), 50 U. S. C. §191 (1964); and 33 CFR §§6.10-1, 6.10-3, 6.10-9, 121.01–121.29.

By Rule 58 of the Rules of this Court, a petition for rehearing will be entertained where the stated grounds are based upon "intervening circumstances of substantial or controlling effect." One intervening event which has been thought to justify reconsideration of an order denying a petition for a writ of certiorari is that the same issue has come before the Court in another case still pending. *Pickett* v. *Union Terminal Company*, 313 U. S. 591, 314 U. S. 704, 315 U. S. 386, 394. This follows from the terms of Rule 19, Rules of the Supreme Court of the United States, which states that one of the considerations governing review on certiorari is whether a lower federal court has decided an important question of federal law which has not been, but which should be, settled by this Court.

Whether such a question is "important" within the meaning of Rule 19 is determined, among other ways, by considering whether the issue is or is not "too moribund for judication," whether "the question had better await the perspective of time," or whether "time would soon bury the question." *Darr* v. *Burford*, 339 U. S. 200, 227 (Frankfurter, *J.*, dissenting).

The fact that another case raising issues almost identical to those presented by the case at bar has been filed in this Court within three months after the instant case was itself filed, is substantial evidence that the federal questions they present are current, important, and far from moribund.

It is not invariably true, of course, that a grant of certiorari is justified only because of the coincidental filing of two closely related cases within a short period of time. But there are additional reasons which justify reconsideration of the denial of certiorari in this case, reasons which show that *Schneider* and the instant case are only illustrative of a widespread national problem which warrants the attention of this Court.

By virtue of the decisions of the United States Court of Appeals for the Second Circuit and the United States District Court for the Western District of Washington, the United States Coast Guard is authorized to make it impossible for petitioner and appellant in *Schneider* to follow their chosen profession solely because of their alleged past political beliefs and associations. But the impact of loyalty-security measures which effectively deny a man or woman employment is by no means confined to Mr. McBride or Mr. Schneider.

Government programs designed to serve the "interests of the national security" (Executive Order 10450, 18 Fed. Reg.

2489 (1953), 3 CFR (1953 Supp.) 72, 5 U. S. C. §631 note) are embedded in our society and affect literally millions of persons. Furthermore, each of the existing security programs, among their other defects, contain the identical vague standards for determining whether one is a "security risk" as are contained in the Coast Guard's port security program.

These security programs affect all government employees, all members of the Armed Forces, United States employees of international organizations, and large numbers of employees in private industry.

Government Employees.

Department of Defense Directive, BNA,* Section 15:121-128M, at 124-128.

Department of the Army, BNA, Section 15:131-160, at 139-141.

Department of the Navy, BNA, Section 15:181-221, at 193-194.

Department of the Air Force, BNA, Section 15:251-275, at 256-258.

Post Office Department, BNA, Section 15:291-298, at 291-293.

Treasury Department, BNA, Section 15:301-311, at 302-303.

Department of Justice, BNA, Section 15:321-329, at 321-322.

Veterans Administration, BNA, Section 15:341-348, at 341-342.

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* Bureau of National Affairs, Manual of Government Security and Loyalty.

Department of Agriculture, BNA, Section 15:361-378, at 362-363.

Department of Commerce, BNA, Section 15:391-400, at 391-392.

Department of Labor, BNA, Section 15:411-418, at 411-412.

Department of the Interior, BNA, Section 15:431-440, at 433-434.

Civil Service Commission, BNA, Section 15:451-458, at 451-453.

Tennessee Valley Authority, BNA, Section 15:511-522, at 516-518.

Atomic Energy Commission, BNA, Section 15:531-539, at 533-534.

Department of State, BNA, Section 15:541-549, at 542-543.

Department of Health, Education & Welfare, BNA, Section 15:561-568, at 562-563.

National Aeronautics & Space Administration, BNA, Section 15:905-920, at 907-908.

See too Civil Service Handbook: Guide for Members of Security Hearing Boards Under Executive Order 10450, BNA, 15:569-582, at 579-580; and Department of Justice, Sample Security Regulations, BNA, Section 15:101-108, at 102-103.

Armed Forces Personnel.

Department of Defense Directive, 5210.9, BNA, Section 31: 51-58, at 53-54.

United States Army, BNA, Section 31:71-84, at 73-75.

United States Navy, BNA, Section 31:111-130, at 113-114.

United States Air Force, BNA, Section 31:161-182, at 164-166.

United States Employees of International Organizations.

Executive Order 10422, 18 Fed. Reg. 239, 2183 (1953), BNA, Section 41:31-35, at 33-34; BNA, Section 41:41-44, at 42.

Employees in Private Industry.

Executive Order 10865, 25 Fed. Reg. 1583, BNA, Section 24:11.

See too Armed Forces Industrial Security Regulations, BNA, 25:1-1; Industrial Personnel Access Authorization Review Regulations, 32 CFR §§155, et seq., BNA, Section 25:151-166K, at 159-161; implementing regulations of the Army, Navy and Air Force: BNA, Sections 25:167, 243, 177, 246; 26:1; 25:242.

The impact of these security programs is felt by a very large number of persons. In 1958 it was estimated that they affected 8,500,000 persons, including about 2,300,000 in federal civilian employment, 3,000,000 in the armed forces, 3,000,000 under the Industrial Security Program, and several hundred thousand under the Port Security Program. As of 1958, Professor Ralph Brown estimated that about 13,500,000 persons were covered by federal, state, local and private security programs. He said, "Taking the total labor force at about 65,000,000, this means that at least one person out of five, as a condition of his current employment, has taken a test oath, or completed a loyalty statement, or achieved official security clearance, or survived some undefined private scrutiny." Brown, *Loyalty and Security,*

164-181 (1958). It has recently been noted in addition that "since 1958 there have been substantial increases in the number of federal, state and local employees, persons in the armed services, and workers covered by the Industrial Security Program. Moreover, the above [Brown] figures represent, of course, only the *current* numbers subject to loyalty tests. They do not take into account the turnover in employment. Thus, from the introduction of the Truman program in 1947 to its supersession by the Eisenhower program in 1953, some 4,756,705 federal employees were checked for loyalty under Executive Order 9835. Civil Service Commission, 1953 Annual Report, p. 32; for further figures, see Special Committee of the Association of the Bar of the City of New York, The Federal Loyalty-Security Program, App. A. (1956). From 1954 through 1962, over 2,500,000 persons were given loyalty checks for federal government employment and 250,000 were given full field investigations. Civil Service Commission, Annual Reports 1954-1962. The figures do not take into account the impact of the exposure to loyalty tests upon members of the family, dependents, and the like." Emerson, Haber and Dorsen, *Political and Civil Rights in the United States* (3rd Ed.), pp. 353-354 (1967).*

In *Cafeteria & Restaurant Workers Union* v. *McElroy*, 367 U. S. 886, 901, Mr. Justice Brennan, in a dissent concurred in by Mr. Chief Justice Warren, Mr. Justice

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* Prof. Brown made a very "rough" estimate that up to 1958 11,500 individuals had, as a consequence of loyalty-security programs been dismissed, denied clearance, or excluded from a calling that was equivalent to dismissal. The total included 3,900 federal employees including military personnel and 5,400 private employees subject to federal programs. The remaining 1,200 were attributable to state and local government employees and self- and privately employed persons. Brown, *id.* at 181-182, 487-488.

Black and Mr. Justice Douglas, characterized the designation of an individual as a "security risk" as the "most odious in our times." Given the length and breadth of the security programs, their effect upon millions of individuals, as well as their effect upon the nation as a whole, this Court should undertake at least to decide whether the "odious" designation of a man as a security risk can be affixed to him under the vague standards employed in the case at bar.

CONCLUSION

For the reasons set forth above and in the petition for a writ of certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Second Circuit.

Respectfully submitted,

MELVIN L. WULF
Counsel for Petitioner

Certificate of Counsel

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 in the Rules of this Court.

MELVIN L. WULF
Counsel for Petitioner